BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DOUGLAS E. SHULTZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 222,319
BIG A AUTO PARTS, INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals from a preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore dated March 19, 1997. The Administrative Law Judge's Order bears Docket No. 217,859. However, this accident was later assigned Docket No. 222,319.

ISSUES

The Administrative Law Judge denied claimant preliminary benefits finding claimant had failed to prove his injury by accident arose out of and in the course of employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was employed by respondent as a traveling salesman. On September 20, 1996, claimant had an appointment to meet a customer in Nickerson, Kansas. Thereafter, claimant planned to go to the respondent's Hutchinson, Kansas, office to turn in his sales tickets and pick up information on other potential customer contacts. As he was entering his car, claimant was injured. The injury was later diagnosed

as a recurrent disc herniation. Surgery was performed by Paul S. Stein, M.D., in Wichita, Kansas.

The Administrative Law Judge found claimant's accidental injury did not arise out of and in the course of his employment with respondent because by merely entering his car, claimant had not yet assumed the duties of his employment, citing K.S.A. 1996 Supp. 44-508(f), and because claimant's injury resulted from a risk that was personal to the worker, citing Martin v. U.S.D. No. 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980) and Siebert v. Hoch, 199 Kan. 299, 428 P.2d 825 (1967).

The claimant argues the Administrative Law Judge erred in holding that claimant's accidental injury did not arise out of and in the course of his employment with respondent.

In order to receive workers compensation benefits, claimant must show that his accidental injury arose out of and in the course of his employment. *See* K.S.A. 1996 Supp. 44-501(a); Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984). Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that case. In Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973), the court stated:

> "The two phrases arising 'out of' and 'in the course of' the employment, as used in our workmen's compensation act (K.S.A. 1972 Supp. 44-501), have separate and distinct meanings, they are conjunctive and each condition must exist before compensation is allowable. The phrase 'in the course of' employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase 'out of' the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises 'out of' employment if it arises out of the nature, conditions, obligations and incidents of the employment." 212 Kan. at Syl. ¶ 1.

In addition, K.S.A. 1996 Supp. 44-508(f) provides:

> "The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence."

K.S.A. 1996 Supp. 44-508(f) "bars an employee injured on the way to or from work from workers compensation coverage." Chapman v. Beech Aircraft Corp., 258 Kan. 653, 655, 907 P.2d 828 (1995). "The rationale for the 'going and coming' rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment." Thompson v. Law Offices of Alan Joseph, 256 Kan. 36, 46, 883 P.2d 768 (1994).

An exception to the "going and coming" rule allows workers compensation coverage where travel on public roadways is an integral or necessary part of the employment. Kindel v. Ferco Rental, Inc., 258 Kan. 272, 899 P.2d 1058 (1995); Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

In Martin, *supra*, the Court of Appeals addressed an injury which occurred in a way similar to the injury in this case. There the Court found:

> "Considering the history of claimant's back problems, it is obvious that almost any everyday activity would have a tendency to aggravate his condition, *i.e.*, bending over to tie his shoes, getting up to adjust the television, or exiting from his own truck while on a vacation trip. This is a risk that is personal to the worker and not compensable." 5 Kan. App. 2d at 300.

However, unlike the claimant in Martin, the claimant here used his vehicle as an integral and necessary part of his employment. The claimant in Martin was not entering his vehicle to make a call on a customer, but Mr. Shultz was. The ultimate question, then, is whether Mr. Shultz was on a mission or duty for his employer and whether that adequately distinguishes this case from Martin and Siebert. Claimant could not perform his job without entering his vehicle. The Appeals Board finds there was a causal connection between the injury and the employer's business.

Accordingly, the issue is not whether claimant's injury could have just as easily occurred entering or exiting his vehicle while on a vacation trip, but rather whether the injury occurred while claimant was acting in the furtherance of his employer's business and whether it arose out of the nature, conditions, obligations and incidents of his employment. *See* Newman, *supra*. By contrast, in both Martin and Siebert, the employees failed to prove their injuries were in any way connected to their work.

In this case, claimant was on a mission for his employer and this was his sole mission. At the time of the accident, claimant had undertaken his employment duties. Furthermore, the injury was not from a risk that was personal to the claimant. Accordingly, the Administrative Law Judge erred in holding that claimant's accident did not arise out of and in the course of his employment.

Respondent, in a footnote to his brief to the Appeals Board, commented about a lack of medical evidence that the September 20, 1996, incident was a new and distinct injury as opposed to a natural and probable consequence of the claimant's prior back injury. However, whether claimant sustained a new accident was not presented as an issue before the Administrative Law Judge at the March 18, 1997, preliminary hearing. At pages 6 and 7 of the transcript of that hearing, the following discussion appears:

> THE COURT: And we have today this accident date, then, of September 20, 1996 when claimant suffered reinjury to his low back while getting into a car. At least that's what's alleged in the E-1.
>
> Does respondent admit claimant met with personal injury by accident on September 20, 1996? Your dispute really is whether it arose out of and in the course of?
>
> MR. TOWNSLEY: That's correct, Your Honor. I don't disagree that something happened to the claimant that day.

At page 32, following claimant's testimony, his attorney began his closing comments with the following observation:

> MR. HOLMES: Basically, with the only issue before the Court being in the course of employment . . .

Respondent's counsel never denied a new accident. In fact, he consistently refers to the September 20, 1996, incident as an accident, such as during the following arguments to the court:

> MR TOWNSLEY: Well, this is a difficult case. The testimony appears to be clear that the claimant owned the vehicle, the respondent did not. Respondent didn't make any contribution towards the vehicle monetarily.
>
> It's clear that the accident occurred on the claimant's premises, not on the respondent's, in his garage, and I guess given that this isn't a company vehicle we're talking about, this is a case of determining where coming and going begins. Again, I think the evidence shows that the accident occurred on the property of the claimant in his garage as he was getting into his car. I think even if the Court accepts the claimant's argument that if he was in his car he was at work, which I don't necessarily agree with, then I don't know that he's met that burden here.
>
> His testimony was the accident occurred as he was getting into the car. So it becomes a factual determination of where does one begin to go to work? (Preliminary Hearing at 33-34.)

As the issues of accident and injury by accident were not raised before the Administrative Law Judge for purposes of the March 18, 1997, preliminary hearing and, therefore, were not addressed by Judge Moore in his March 19, 1997, Order, the Appeals Board will likewise not address those issues in this Order.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore dated March 19, 1997, should be, and is hereby, reversed and remanded to the Administrative Law Judge for further proceedings consistent with this opinion.

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

c: David F. Holmes, Hutchinson, KS
William L. Townsley III, Wichita, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director